

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 26 November 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

**Decision on the Prosecution's motion for reconsideration of the decision
excusing Mr Kenyatta from continuous presence at trial**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Articles 63, 64 and 67 of the Rome Statute ('Statute'), by majority, issues the following 'Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial'.

I. Procedural Background and Submissions

1. On 6 September 2013, the defence team for Mr Kenyatta ('Defence') submitted an oral application for the excusal of Mr Kenyatta from continuous presence at trial,¹ which was opposed by the Office of the Prosecutor ('Prosecution') and the Legal Representative of Victims ('LRV').² On 23 September 2013, following an order of the Chamber,³ the Defence filed the 'Defence Request for Conditional Excusal from Continuous Presence at Trial' (together with the Defence's oral submissions 'Excusal Request').⁴ The Excusal Request sought the conditional excusal of Mr Kenyatta from continuous presence at trial on such terms that his physical presence in the courtroom would only be required at the opening, closing and delivery of the judgment. It further submitted that if at any other time Mr Kenyatta's presence would be required, or he would wish to participate, this should be satisfied by way of video link.⁵

¹ ICC-01/09-02/11-T-26-ENG.

² ICC-01/09-02/11-T-26-ENG.

³ E-mail from the Chamber to the parties on 12 September 2013 at 15.40h.

⁴ Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013, ICC-01/09-02/11-809.

⁵ ICC-01/09-02/11-809, paras 1, 28, 38; ICC-01/09-02/11-T-26-ENG, page 18, lines 14-22.

2. On 1 October 2013, the Prosecution responded to the Excusal Request, opposing it.⁶ That same day, the LRV also filed a response opposing the Excusal Request.⁷
3. On 18 October 2013, the Chamber, by majority, issued the 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial' ('Excusal Decision').⁸ The majority granted the relief requested by the Defence in the Excusal Request in part by excusing Mr Kenyatta from continuous presence for part of his trial in order to accommodate the discharge of his duties of state.⁹ The Excusal Decision listed those hearings during which Mr Kenyatta would have to be physically present in the courtroom.¹⁰
4. In the Excusal Decision, the majority recalled that Trial Chamber V(A), by majority, granted Mr Ruto a conditional excusal from continuous presence at trial.¹¹ The majority in the Excusal Decision found that 'the entirety of the material reasoning employed in that decision is fully applicable to the current request of Mr Kenyatta, with necessary variations' and adopted the said reasoning in full.¹² It identified the fact that Mr Kenyatta is the President of Kenya as an important variation, providing all the more reason to apply to Mr Kenyatta the conditional excusal that was granted to Mr Ruto in consideration of the important functions that his position as Deputy President of Kenya involves.¹³

⁶ Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11-818, paras 4-5.

⁷ Victims' Response to "Defence Request for Conditional Excusal from Continuous Presence at Trial", ICC-01/09-02/11-819.

⁸ ICC-01/09-02/11-830; Judge Ozaki appended a partially dissenting opinion and Judge Eboe-Osuji a separate opinion. See, respectively, Partially Dissenting Opinion by Judge Ozaki (ICC-01/09-02/11-830-Anx2), and Separate Further Opinion by Judge Eboe-Osuji (ICC-01/09-02/11-830-Anx3-Corr2).

⁹ Excusal Decision, ICC-01/09-02/11-830, para. 124.

¹⁰ Excusal Decision, ICC-01/09-02/11-830, para. 124.

¹¹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 ('Ruto Decision').

¹² Excusal Decision, ICC-01/09-02/11-830, para. 66.

¹³ Excusal Decision, ICC-01/09-02/11-830, para. 66 (quoting the *Ruto* Decision at para. 49).

5. In *Ruto and Sang*, the Prosecution was granted leave to appeal the *Ruto Decision*¹⁴ and on 25 October 2013 the Appeals Chamber delivered its ruling on this appeal ('Appeals Judgment').¹⁵ The Appeals Chamber found that 'the discretion that the Trial Chamber enjoys under Article 63 (1) of the Statute is limited and must be exercised with caution'.¹⁶ It specified six limitations to that discretion.¹⁷ The Appeals Chamber considered that regarding these limitations, Trial Chamber V(A) had not properly exercised its discretion in the *Ruto Decision*.¹⁸ It recalled that the presence of the accused must remain the general rule and concluded that Trial Chamber V(A) had interpreted the scope of its discretion too broadly, exceeding the limits of its discretionary power.¹⁹ The Appeals Chamber therefore reversed the *Ruto Decision*.
6. On 28 October 2013, the Prosecution filed the 'Prosecution's Motion for Reconsideration of the "Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial" and in the alternative, Application for Leave to Appeal' ('Motion for Reconsideration'),²⁰ seeking the Chamber's reconsideration of the Excusal Decision, in light of the Appeals Judgment. The Prosecution requests

¹⁴ On 18 July 2013, the Prosecution was granted leave to appeal the *Ruto Decision* by the majority of Trial Chamber V(A) (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817). On 29 July 2013, the Prosecution filed the 'Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial' (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-831).

¹⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ICC-01/09-01/11-1066.

¹⁶ Appeals Judgment, ICC-01/09-01/11-1066, para. 61.

¹⁷ The limitations are "(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested". Appeals Judgment, ICC-01/09-01/11-1066, para. 62.

¹⁸ Appeals Judgment, ICC-01/09-01/11-1066, paras 61 and 63.

¹⁹ Appeals Judgment, ICC-01/09-01/11-1066, para. 63.

²⁰ ICC-01/09-02/11-837.

the Chamber to vacate the Excusal Decision²¹ and revert to the ‘general rule’ under Article 63(1) of the Statute that Mr Kenyatta must be present during trial,²² or in the alternative, that it be granted leave to appeal this decision.²³ The Prosecution submits that, as a result of the outcome of the Appeals Judgment, the criteria for reconsideration are met. It contends that the Appeals Judgment provides new and previously unavailable information which has a decisive impact on the Excusal Decision.²⁴ The Prosecution argues that if the Appeals Judgment had been issued prior to the Excusal Decision, the Chamber would have been required to reach a different conclusion than the one it reached in the Excusal Decision.²⁵

7. The Prosecution submits that the Appeals Judgment clarified ‘the applicable law both with respect to the legal basis employed by the Trial Chamber’, as well as the relief that was granted in the Excusal Decision.²⁶ It further submits that the conclusions and underlying reasoning of the Appeals Judgment in reversing the *Ruto* Decision, apply equally to the Excusal Decision, because the latter granted ‘the same relief for the same reasons’.²⁷ According to the Prosecution, it would be ‘difficult to imagine’ that the Appeals Chamber would rule differently on an appeal against the Excusal Decision.²⁸

8. The Prosecution combined its request for reconsideration with an application, in the alternative, for leave to appeal the Excusal Decision. The issue it seeks to appeal is ‘whether the Trial Chamber correctly exercised its discretion when excusing the Accused from attending substantially all of his trial without first exploring whether

²¹ Motion for Reconsideration, ICC-01/09-02/11-837, para. 10.

²² Motion for Reconsideration, ICC-01/09-02/11-837, para. 16.

²³ Motion for Reconsideration, ICC-01/09-02/11-837, para. 10.

²⁴ Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.

²⁵ Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.

²⁶ Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.

²⁷ Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.

²⁸ Motion for Reconsideration, ICC-01/09-02/11-837, para. 12.

there were any alternative options and without exercising its discretion to excuse the Accused on a case-by-case basis at specific instances of the proceedings, and for a duration limited to that which was strictly necessary'.²⁹

9. On 29 October 2013, the LRV filed his response, supporting the Motion for Reconsideration and the reasoning set out therein.³⁰

10. On 5 November 2013, the Defence notified the Chamber that it would not respond to the Motion for Reconsideration.³¹

II. Analysis by the Chamber

11. The Statute does not provide guidance on reconsideration, but the Chamber agrees with the observation made by Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* that it would be incorrect to state that decisions can only be varied 'if permitted by an express provision in the Rome Statute framework'.³² The Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or *proprio motu*.³³ In reference to Trial Chamber I's practice, Trial Chamber V acknowledged that 'it may reconsider past decisions when they are "manifestly unsound and their consequences are manifestly

²⁹ Motion for Reconsideration, ICC-01/09-02/11-837, para. 19.

³⁰ Victims' Response to "Prosecution's Motion for Reconsideration of the 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial' and in the alternative, Application for Leave to Appeal", ICC-01/09-02/11-841.

³¹ E-mail sent by the Defence to the Chamber on 5 November 2013 at 15:39.

³² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

³³ Article 64(2) and (3) of the Statute. In the Excusal Decision, it was already noted that "[t]his decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant" (Excusal Decision, ICC-01/09-02/11-830, para. 124). The Chamber further notes that the Statute, pursuant to Article 84, allows for the reconsideration of a conviction (or sentence) as a result of new evidence, and considers that logically reconsideration of a procedural matter therefore is also allowed.

unsatisfactory”³⁴. Reconsideration should only be done in exceptional circumstances. The Chamber finds support, as was also done by Trial Chamber I,³⁵ in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are equally silent as to the power of reconsideration,³⁶ that those circumstances can include ‘new facts or new arguments’.³⁷

12. The Chamber considers that the Appeals Judgement provides important new information. Whereas it was rendered in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, rather than the instant case, it provides guidance in relation to the question at issue that cannot be set aside by this Chamber. In the current circumstances, where the Appeals Chamber has reversed a decision which was grounded on the same reasoning and resulting in a similar outcome as the Excusal Decision,³⁸ the Chamber considers that the present circumstances satisfy the reconsideration standard discussed above. Moreover, it would be contrary to the

³⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 13 December 2012, ICC-01/09-01/11-511, para 6 (quoting ICC-01/04-01/06-2705, para. 18)

³⁵ ICC-01/04-01/06-2705, paras 15-17. Trial Chamber I, by majority, noted that the ‘approach by the *ad hoc* Tribunals reflects the position in many common law national legal systems’. ICC-01/04-01/06-2705, para. 18.

³⁶ ICC-01/04-01/06-2705, paras 15-17. Later jurisprudence uses similar wording: see, e.g., ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Motion for Reconsideration of Decisions to Admit Testimony and Statement of Witness KDZ486, 25 October 2013, para. 7; and ICTY, *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5.

³⁷ See, *inter alia*, ICTY, *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5; *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Decision on Prosecution’s Motion for Reconsideration of the Decision on the Second Bar Table Motion Filed 23 December 2010, 22 January 2013, para. 28; ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 6, 18; see ICTY, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204; ICTR, *Prosecutor v. Augustin Ndirabware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, 15 July 2010, paragraphs 16 - 17; ICTR, *Prosecutor v. Augustin Ndirabware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010, 27 January 2011, paragraphs 24-25.

³⁸ The majority notes that the Excusal Decision incorporated the reasoning of the *Ruto* Decision, in its entirety, by reference (see ICC-01/09-02/1-830, para. 66). Although the Excusal Decision contained additional reasoning that was not included in the *Ruto* Decision, the effect of the disposition and conditions of excusal was similar.

principle of judicial economy and the expeditiousness of the proceedings to require the Appeals Chamber to rule on the same issue of excusal in the present case. The Chamber therefore, mindful of its duty to ensure that the trial is fair and expeditious, considers it appropriate to reconsider its decision.

13. The Appeals Chamber clarified that 'Article 63(1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused'³⁹ and that trial chambers have discretion in granting case-by-case excusals. In holding that there should be no 'blanket excusal' and that the absence of the accused should not be the 'general rule',⁴⁰ the Appeals Chamber set out six limitations to be taken into account when deciding, on a case-by-case basis, on excusal requests.⁴¹

14. In the Excusal Request, the Defence requested as primary relief that

(i) President Kenyatta is conditionally excused from continuous presence at trial whereby he attends in person the opening and closing of trial and delivery of judgment before the International Criminal Court; and

(ii) In respect of all other hearings wherein the Court requires the presence of Uhuru Kenyatta, or he requests to be present, such presence is fulfilled by way of video-link.⁴²

In addition, as alternative relief, the Defence requested that

[i]n the event that the Chamber does not conditionally excuse President Kenyatta from continuous attendance at trial, President Kenyatta's continuous presence at trial be by means of video link.⁴³

³⁹ Appeals Judgment, ICC-01/09-01/11-1066, para. 1.

⁴⁰ Appeals Judgment, ICC-01/09-01/11-1066, para. 63.

⁴¹ Appeals Judgment, ICC-01/09-01/11-1066, paras 62-63.

⁴² Excusal Request, ICC-01/09-02/11-809, para. 38.

⁴³ Excusal Request, ICC-01/09-02/11-809, para. 39.

15. In the Excusal Decision, first, the majority of the Chamber granted the Excusal Request in part by determining that Mr Kenyatta had to be physically present in the courtroom for certain specified hearings, and that his absence from trial during the rest of the hearings 'must always be and be seen to be directed towards the performance of Mr Kenyatta's duties of state'.⁴⁴ All other requests were rejected.⁴⁵ Second, the Chamber unanimously⁴⁶ directed the Defence to refrain from using Mr Kenyatta's official title in its filings.

16. The majority hereby reconsiders the first part of the disposition of the Excusal Decision. In light of the Appeals Judgment, the majority now rejects the primary relief sought in the Excusal Request. Mr Kenyatta will therefore, as a general rule, have to be present for his trial. Any future requests by the accused to be excused from attending parts of the trial will be considered on a case-by-case basis. The Chamber's consideration of any such request(s) shall include the following criteria:

- (i) Mr Kenyatta will only be excused in exceptional circumstances and his absence will not become the rule;
- (ii) the possibility of alternative measures will first be considered, including, but not limited to, changes to the trial schedule or a short adjournments;
- (iii) any absence must be limited to that which is strictly necessary;
- (iv) Mr Kenyatta, on each occasion, must explicitly waive his right to be present at trial;

⁴⁴ Excusal Decision, ICC-01/09-02/11-830, page 54.

⁴⁵ Excusal Decision, ICC-01/09-02/11-830, page 55.

⁴⁶ Judge Ozaki joined the majority on this point. See Partially Dissenting Opinion by Judge Ozaki, ICC-01/09-02/11-830-Anx2, para. 1.

- (v) the rights of Mr Kenyatta as an accused must be fully ensured in his absence, in particular through representation by counsel; and
- (vi) due regard will be given to the subject matter of the specific hearings for which an excusal to attend has been requested.

17. The remainder of the disposition of the Excusal Decision is unaffected by the Appeals Judgment. Hence, all other requests made in the Excusal Request are rejected. The Chamber further reaffirms its direction to the Defence not to use the accused's official title in its filings.

18. As the Motion for Reconsideration is granted, the alternative request for leave to appeal need not be considered.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

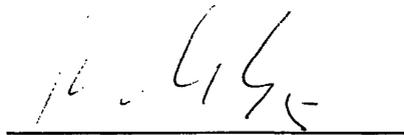
GRANTS the Motion for Reconsideration;

REJECTS the primary relief sought in the Excusal Request and **DETERMINES** that the Chamber will apply the standard as set out in paragraph 16 above to any future requests for excusal; and

AFFIRMS the Excusal Decision in all other aspects.

Judge Eboe-Osuji appends a dissenting opinion.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 26 November 2013

At The Hague, The Netherlands